United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6052

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

SAMUEL M. KAYNARD, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

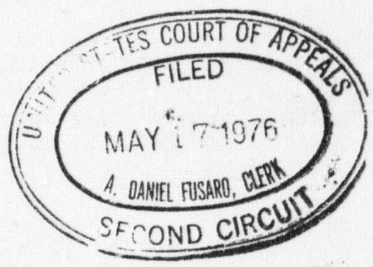
LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent-Appellee.

- -x

BP/s

Case No. 76-6052



ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL M. KAYNARD, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner-Appellant, v. LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Respondent-Appellee.	Case No. 75-6052

BRIEF FOR RESPONDENT-APPELLEE

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STATEMENT OF THE ISSUE

Is there reasonable cause to believe that the National Labor Relations Board will find that the Union's attempt to enforce by arbitration or by picketing Article 50(B) of its collective bargaining agreement with Bader Brothers violated Section 8(e) and Section 8(b)(4)(i)(ii)(A) and (B) of the Act, and, if so, is there reasonable cause to believe that such a finding will be enforced by this Court?

STATEMENT OF THE CASE

Preliminary Statement

Statute Involved

This appeal involves Sections 10(1), 8(e) and 8(b)(4) of the National Labor Relations Act, as amended, 29 U.S.C. 158 et seq. Relevant provisions of the statute are reproduced herein at pages 45-48 and at pages 9 and 15 of appellant's brief.

Proceedings Below

This is an appeal from an order (A.)* issued on February 4, 1976 by United States District Judge Costantino denying an application for an injunction under Section 10(1) of the National Labor Relations Act, as amended (the "Act") 29 U.S.C. §160(1).

Appellant (petitioner below) is the Regional Director of the 29th Region of the National Labor Relations Board. Appellee (respondent below) is a labor union representing employees of Bader Brothers Warehouses, Inc. (the "employer" or "Bader Brothers"). Upon an unfair labor practice charge filed by Bader Brothers, the Regional Director issued a complaint against the Union alleging that the Union had violated Sections 8(e) and 8(b)(4)(i)(ii)(A) and (B) of the Act. Pursuant to the complaint, a full-sclae evidentiary hearing was held on September 17 and 18, 1975 before Administrative Law Judge ("ALJ") Paul Bisgyer, of the National Labor Relations Board (the "Board").** On January 28, 1976,

*Numerical citations following the letter A refer to pages of the Joint Appendix.

**The parties stipulated that the record of this proceeding would constitute the record before Judge Costantino on the Regional Director's application for a 10(1) injunction. (A.).

Judge Bisgyer issued his decision dismissing the complaint in its entirety. (A.). On February 4, 1976, Judge Costantino found that "After a review of this decision (of Judge Bisgyer) and the entire record, this court must conclude that petitioner does not have reasonable cause to believe that respondent has engaged in the charged unfair labor practices. Accordingly, the application for injunctive relief is denied." (A.).

Statement of the Facts

The Bader Corporation

Bader Brothers, Inc. began operations as a moving and storage business in New York in 1905. (A.). In 1952, Bader Brothers, Inc. "spun off" three separate but related Bader Corporations: Bader Warehouses, Bader Van Lines and Bushwick. Bader Warehouses and Bader Van Lines thereafter continued the Bader Brothers, Inc. moving and storage operations until March 25, 1975 (A).*

Bader Warehouses operated a local moving and storage business, and also supplied drivers for the long-distance moving operations of Bader Van Lines until March 26, 1975 (A.). It also owns the land and building occupied by the Bader Corporations at 475 Underhill Boulevard, Syosset, New York (the "Syosset facility"). The Syosset facility includes a warehouse,

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*Bader Van Lines and Bushwick were not referred to in the Consolidated Complaint or in any other manner until the hearing before the Administrative Law Judge when the General Counsel moved to amend the complaint to include Bushwick and Bader Van Lines. (A.). It is obvious that the General Counsel did not take into account the existence of these companies or their relationship to Bader Warehouses when he constructed the theory of his case.

furniture repair shop, garage, vehicle repair shop and offices (A.).

Bader Van Lines engaged in long-distance moving in interstate commerce under an Interstate Commerce Commission certificate (A.) using drivers supplied by Bader Warehouses (A.) and independent owner-operators (A.).

Bushwick purchased new and used vehicles, including tractor-trailers and trucks, which it rented, leased or sold primarily to Bader Warehouses and Bader Van Lines for use in their moving and storage operations (A.). It did not purchase vehicles for the purpose of leasing them to operators not affiliated with Bader Warehouses or Bader Van Lines (A.). Bushwick also operated the vehicle maintenance and repair shop at the Syosset facility using four non-union mechanics (A.).

Bushwick purchased new and used vehicles primarily for use by Bader Warehouses and Bader Van Lines in their moving and storage operations (A.). From 1968 to 1974, Bushwick bought 20-30 new and used tractors (A.). Its peak fleet in 1968-1970 consisted of 60 tractors and 75 trailers (A.), and its fleet was 60%-70% of that number in 1974 (A.).

Some of these vehicles were sold to others when they were not needed in the Bader moving and storage operations (A.), and some trailers for mobile storage and straight vans were leased or rented to others (A.). The last sale of a tractor-trailer was in March 1974 (A.), and Bushwick sold approximately six tractor-trailers to others in the last five years (A.). Tractors or trailers were sometimes sold to independent owner-operators who did long-distance moving for Bader Van Lines (A.). Trucks were also leased to these owner-operators (A.).

The Bader Corporations were all operated from the Syosset facility under the direction of Herman Bader ("Bader"), but are separate corporate entities which were carefully maintained as such at all times. Each corporation issues its own profit and loss statement, has its own bank accounts, pays its own employees and submits its own tax returns (A.). Bader Warehouses' moving and storage employees were members of Local 814. Bader Van Lines' moving and storage employees were either employees of Bader Warehouses (and therefore members of Local 814), or non-union independent owner-operators. Its other non-moving and storage employees were not members of Local 814. Bushwick employees were non-union.

The Relationship of Local 814 and the Bader Corporations

Bader Warehouses' moving and storage employees, including drivers, helpers, warehousemen and packers, are represented by Local 814 (A.). Prior to 1952, Bader Brothers, Inc., the predecessor of the Bader Corporations, had a collective bargaining agreement with Local 814 covering moving and storage employees for many years (A.). Bader Warehouses has had similar agreements with Local 814 since the former was incorporated in 1952 (A.).

Bader signed the most recent collective bargaining agreement between Local 814 and Bader Warehouses (effective April 1, 1974 through March 31, 1977) on behalf of Bader Warehouses on March 31, 1974 (A.). [the "Agreement"].

Bader Warehouses and Local 814 maintained seniority lists for employees covered by the Agreement (A.). A seniority list by job classification was maintained for household moving jobs, while a straight payroll seniority list was used for commercial moving (A.). All Local 814 members worked in moving and storage, and Bader Warehouses' employees were eligible for the seniority list if they worked 30 days out of 90 (A.). Employees on the seniority list got available moving and storage work first (A.). Local 814 members on the

Bader Warehouses' list had seniority only for Bader Warehouses moving and storage work (A.) and for Bader Van Lines moving and storage work done by Bader Warehouses' employees.

Local 814 does not maintain a hiring hall (A.). The collective bargaining agreement provides that the Union may be called upon to refer men when the seniority list is exhausted, but in practice there was no formal referral system and the seniority list was rarely exhausted in recent years. (A.). When Bader Warehouses exhausted its seniority list, it called the receptionist at the Local 814 offices who relayed the request for help to a business agent, or it called a union official directly (A.).

Bader testified that nine men were on the Bader Warehouses seniority list prior to March 25, 1975 (A.), and that these men were the first nine on Local 814's Exhibit One for identification ("RX 1") (A.). He further indicated that the other three men on RX 1 did not shape for work on a regular basis (A.).

Bader Van Lines and Bushwick were not signatories to the collective bargaining agreements between Local 814 and Bader Warehouses (A.), and neither ever

directly employed or paid any employee who was a member of Local 814. Bader Van Lines employed 16 persons, including corporate officers and office employees, none of whom were Local 814 members (A.). For long-distance moving operations, it used Bader Warehouses' employees who were members of Local 814 and who were paid directly by Bader Warehouses when they did Bader Van Lines work, as well as non-union independent owner-operations (A.).

Bushwick never signed the Local 814 agreement with Bader Warehouses (A.), and never employed or used Local 814 members, since its operations did not include any actual moving and storage work. Bushwick employed a foreman and three mechanics in the vehicle repair shop at the Syosset facility who were not represented by any union (A.).

Bader testified that he had orally agreed with the former president of Local 814 during the 1971 contract negotiations between Local 814 and Bader Warehouses that any man used by any of the Bader Corporations as a driver, helper, warehousemen or packer within the meaning of the Bader Warehouses-Local 814 collective bargaining agreement would be covered by the terms of that Agreement (A.).

The effect of this oral agreement, if it existed, was that Bader Warehouses' employees used by Bader Van Lines for long-distance moving received regular wages and benefits in accordance with the Agreement directly from their employer, Bader Warehouses, and that Bader Warehouses was subsequently reimbursed for these amounts by Bader Van Lines. The alleged oral agreement had no effect on Bushwick, since no Local 814 member worked for Bushwick on any basis.

The Termination of the Moving and Storage Business of the Bader Corporations and the Dispute with Local 814

The dispute between Bader Warehouses and Local 814 over Article 50(B) of the Agreement resulted from the decision of the Bader Corporations to terminate their moving and storage business. During the summer of 1974, the Bader Corporations began negotiations with Greyhound Van Lines, Inc. ("Greyhound") for the sale of the physical assets of the Bader Corporations' moving and storage business and for the lease of the Syosset facility (A.).*

*Earlier in 1975, Bader had engaged in similar negotiations with Pan American Van Lines, Inc. of Long Beach, California, and an agreement was signed by the parties, but Pan American defaulted (A.). Prior to the Greyhound negotiations, Bader Warehouses sold an ancillary warehouse facility at 900 Atlantic Avenue, Brooklyn, New York to Coventry Van Co. (A.). The four former employees of Bader Warehouses, who are members of Local 814, now work for Coventry (A.).

An agreement for the sale of virtually all of the physical assets of the moving and storage business of the Bader Corporations dated September 1, 1974 (A.), was signed on or about September 4 or 5, 1974 (A.).

Almost all of the vehicles owned by the Bader Corporations were sold to Greyhound for eventual use by Golden Cycle, including 43 trailers and 20-25 tractors (A.).

At the same time, Bader Warehouses and Greyhound also entered into a ten-year lease for the Syosset facility dated September 1, 1975 (A.). The lease agreement commenced on September 1, 1974, and Bader Warehouses has received payments under the lease since that date (A.). Both agreements were acknowledged for Greyhound on September 1, 1975, and for the Bader Corporations on September 10, 1975 (A.).

Most of the physical assets of the Bader Corporations used in the moving and storage business were sold or

leased in the Greyhound transaction, and most of the remaining assets were subsequently sold or leased to others. The Bader Corporations retained only their "good will", corporate names, certain accounts receivable, some files, a few desks and chairs, unreclaimed lots of household goods and an old truck (A.). The Interstate Commerce Commission certificate under which Bader Van Lines did its long-distance moving and storage business was subsequently sold (A.). Bushwick retained only five or six tractors and several personal automobiles after the Greyhound transaction (A.). One of the tractors was later sold to American Security Van Lines, Inc., and four were rented to the same company on an annual basis, as they had been in 1974 (A.).

The actual transfer of assets and cessation of moving and storage operations by the Bader Corporations was not completed until nearly seven months after the Greyhound agreements were signed in September, 1974 (A.). In January and February, 1975, moving and storage customers were notified that the Bader Corporations were going out of the moving and storage business and large storage accounts were moved out of the Syosset facility warehouse (A.).

In February, 1975, Golden Cycle was incorporated as a subsidiary of Greyhound or of Golden Cycle Transportation

Co. (A.) in order to operate a moving and storage business from the Syosset facility formerly used by the Bader Corporations and using their physical assets (A.).

Bader Warehouses and Bader Van Lines continued to accept moving jobs until the week of March 17, 1975 (A.). All moving and storage operations ceased by March 25, 1975. (A.). Golden Cycle officially began its operations at the Syosset facility on March 17, 1975, (A.), and hired its first employees in mid-March (A.). Its employees do normal moving and storage work (A.), and in September, 1975, Golden Cycle employed approximately 15 employees at the Syosset facility doing moving and storage work. (A.). The moving and storage business comes directly from customers and by referral from Greyhound (A.). Bader Warehouses and Bader Van Lines no longer engaged in any moving and storage operations, and are completely inactive, except to the extent that they continue to receive payments for assets sold or leased (A.). Since the Greyhound agreement was signed, Bushwick has not purchased or sold any vehicles (A.), and it no longer operates the vehicle maintenance and repair shop at the Syosset facility.

Bader testified with respect to the future activities of Bader Warehouses and Bader Van Lines that the purpose of their continued existence, other than winding up the moving and storage business, is that:

> "...we may and have been thinking seriously, once we get through the process of winding down what we are doing, of going into some other kind of business, not the moving and storage business. We are phasing out of the moving and storage business. That total answer would be decided later on, certainly not now as to possible liquidation, but our business, our operations, our corporation is still viable, still open to do whatever we want to do with it, outside of remain in the moving and storage business." (A.).

From the foregoing it is clear that the Bader Corporations have gone out of the moving and storage business, and are otherwise inactive. What remains in each case is nothing more than a corporate shell.

On March 17, 1975, Fred Bauer, general manager of the Bader Corporations, met with the Bader Warehouses employees on the Local 814 seniority list who were at work that day in the conference room of the Syosset facility (A.). Bauer testified that he told the men that Bader was winding-up his moving and storage operations due to economic conditions and that the two moving jobs in progress would be the last (A.).

Local 814 learned of the Bader Corporations - Greyhound transaction and its consequences after the March 17th meeting (A.). Shortly after the March 17th meeting, Philip Doran, a Local 814 business agent, contacted Bauer at the Syosset facility for information concerning cessation of moving and storage operations by Bader Warehouses (A.). On March 17th or 18th, Jospeh Danetra, another Local 814 business agent, told Vincent Bracco, the president of Local 814, and Charles Martelli, its secretary-treasurer, that he had learned from Thomas Coppinger, the shop steward at Bader Warehouses, that Bader Warehouses' employees who were members of Local 814 had been told they would be terminated as of March 25, 1975 (A.).

On March 20, 1975, William Cross, the general manager of Golden Cycle, met with Doran and Danetra. Cross was asked to hire the former Bader employees and to sign the Local 814 contract. Cross said that Golden Cycle would not assume the Local 814 agreement with Bader Warehouses and that Golden Cycle would accept applications from any person and select the employees it needed (A.). Only one of the former Bader employees was subsequently hired (A.).

On March 20, 1975, Local 814 sent telegrams to Bader Brothers, Inc. and Golden Cycle at the Syosset facility demanding that Bader Brothers, Inc. comply with Article 50(B) of the Agreement, and that Golden Cycle assume

the obligations of the Agreement (A.). Bader received the telegram to Bader Brothers, Inc. on March 21, and Cross received the telegram to Golden Cycle on March 24 (A.). On March 25, 1975, Martelli received a telegram from Bader indicating that he would turn the telegram he had received over to Golden Cycle (A.).

All Bader Warehouses employees who were members of Local 814 were terminated as of March 25, 1975 (A.). Martelli testified that he received a letter dated March 25, 1975 from Cross to Bracco on March 26, 1975 which stated that Golden Cycle would not abide by the Bader Warehouses agreement with Local 814 because it would not be profitable for it to do so (A.). It is not disputed that no notice in writing was ever given to Local 814 by Bader or anyone else regarding the Greyhound transactions (A.).

On March 26, 1975, Local 814 members who had been employed by Bader Warehouses began peaceful picketing of the Syosset facility on the sidewalk in front of the facility (A.). The picketing was conducted on a regular basis until July 25, 1975 (A.).

The number of men picketing varied, and there were no picketers some days (A.). It was stipulated at the hearing that the signs carried by the picketers said:

> "Local 814, I.B. of T. on strike against Golden Cycle Vans, of New York, Inc. and Bader Brothers. No dispute with any other employer." (A.).

There has been no picketing at all since July 25, 1975.

SUMMARY OF ARGUMENT

It is the position of the Union that:

1. The appropriate standards for injunctive relief under Section 10(1) of the Act have not been satisfied by the regional director.

2. The clause under attack is a valid work preservation clause which does not violate Section 8(e) of the Act.

3. The sale of Bader Brothers' business is not "doing business" within the meaning of Section 8(e) of the Act.

4. The Court should not interfere with the arbitration process in the particular circumstances of this case.

5. The picketing engaged in by the Union was lawful primary picketing.

6. It would not be "just and proper" to issue equitable relief against the Union.

ARGUMENT

POINT I

THE APPROPRIATE STANDARDS FOR INJUNCTIVE RELIEF UNDER SECTION 10(1) OF THE ACT

Section 10(1) carves out a narrow exception to the Norris-LaGuardia Act prohibition against the issuance of injunctions in labor disputes. In McLeod v. Business Machines and Office App. Mech. Conf. Bd., 300 F.2d 237 (2nd Cir. 1962), the Court reviewed the restrictions on District Court issuance of injunctions under Section 10(1). The Court noted that injunctions have historically been inappropriate remedies in labor disputes because "they often settled the dispute under the guise of merely preserving the status quo." Ibid at 240. The Court recognized that the traditional inadvisability of utilizing the injunctive process continued after Section 10(1) was enacted, because:

> "The preliminary injunction is of critical importance to participants in labor disputes, for it may have as great an effect upon the dispute as the ultimate outcome of the litigation." Id. at 242

This court in Business Machines, supra, set forth the standard for the District Court to apply in deciding whether to issue an injunction pursuant to Section 10(1):

> "We do not hold a district court's sole inquiry under Section 10(1) is whether anticipation of Board relief is reasonable. We say only that in the absence of such a finding, no relief is obtainable. Having made such a finding, however, the court must further find reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals. Conversely, the Regional Director must demonstrate some support, both factual and legal, for every element of his case." Id. at 242, fn. 17.

The Court went on to say in effect that the most appropriate forum for the resolution of unfair labor practice complaints issued by the General Counsel was the Board and not the District Court:

> "A careless interpretation of Section 10(1), therefore, may make the General Counsel and federal district courts the actual focal points of unfair labor practice adjudications. But this is precisely the result Norris-LaGuardia and Section 10(1) were designed to avoid in their deliberate minimization of the role of the Courts in these matters." Id. at 242.

This court elaborated on the standards in Danielson v. Joint Bd. of Coat, Suit & Allied Gar. Wkrs. Union, 494 F.2d 1230 (2nd Cir. 1974). In that case the Court made it clear that an injunction may not be issued pursuant to

Section 10(1) without both a finding by the District Court that there is "some significant possibility" that the Board will sustain an unfair labor practice charge and that such a Board decision would be enforced by the Court of Appeals. Ibid. at 1244.

The Court expressly rejected the General Counsel's contention that a District Court must issue a Section 10(1) injunction "unless it was willing to characterize his contentions as insubstantial and frivolous." Id. at 1239. After an extensive review of Section 10(1) statutory language, legislative history and case law, Judge Friendly concluded that there was nothing to justify the position:

> "...that in 10(1) Congress directed the district courts to issue an injunction whenever the Regional Director has advanced a claim sufficiently 'thoughtful' to escape being branded as 'insubstantial and frivolous'...." Id. at 1244.

Thus, the bald assertions by Appellant that the facts of this case, "considered in the light of the legal authority cited in support of the petition, clearly demonstrate that Petitioner has not acted frivolously in concluding that there is reasonable cause to believe that a violation of the Act has been committed" (Pet. Mem. to Judge Costantino, p.9 and appellant's brief to this court p. 12, fn. 9) is irrelevant and misleading - this Court's standard for issuance of a 10(1) injunction is in fact far more stringent.

Where, as here, the law with respect to an alleged violation, as viewed in the most favorable light to the Regional Director, is developing and unsettled, and the position of the General Counsel novel, the Court has counseled extreme caution in the issuance of a Section 10(1) injunction, and has indicated that the determination of the District Court "that there is reasonable cause to believe an unfair labor practice has been committed is a question of law subject to full appellate review." Id. at 1244-45. In Joint Board, the Court reversed the grant of a Section 10(1) injunction by the District Court, stating:

> "When Congress enacted §10(1), it was thinking primarily of the run of the mine cases where the law was relatively plain although the facts might be in serious dispute, not of a new adventure of the General Counsel in the interpretation of a statute fourteen years after it had come on the books. In such a case it is more realistic to regard the status quo as what everyone assumed it to be until General Counsel evolved his new theory, rather than this employer's position the moment before the pickets appeared. When that occurs, we think Congress would have wished the courts to perform their traditional role rather than enjoin conduct which they consider clearly lawful even for the interval before the Board has determined whether an unfair labor practice has occurred and has sought enforcement of an order finding that it has." Id. at 1245

The precise holding of the case is stated at p. 1245:

> We hold only that when, after full study, the district court is convinced that the General Counsel's legal position is wrong...it should not issue an injunction under §10(1).

In the instant case, the position of the General Counsel is wrong. It may fairly be characterized as a "new adventure" in the interpretation of 8(e). There are no "relatively plain" Board or Court decisions which decide the issue presented here in favor of the General Counsel. On the contrary, what is "relatively plain" is that the decisions of the Board and Court of Appeals, infra, support the position of Respondent, as does the decision by the Administrative Law Judge dismissing the complaint herein against the Union. Although the decision of the Law Judge is not binding on this court, it is of substantial persuasive value particularly concerning factual matters. See Seeler v. Trading Port, 517 F.2d 33, fn. 7 at 37 and fn. 11 at 40 (2nd Cir. 1975). Most significantly, the Administrative Law Judge's findings of fact based on his evaluation of the testimony of witnesses before him are virtually binding on the Board. See Standard Drywall Products, Inc., 91 NLRB 544, at 545 where the Board held:

> "Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear

> preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." (emphasis in original) [Administrative Law Judges formerly were titled Trial Examiners].

In this case, unlike most 10(1) applications, the record before the Administrative Law Judge was stipulated to constitute the record before the District Court. The Law Judge issued his findings and dismissed the complaint against the Union. Thereafter Judge Costantino denied the Regional Director's application for an injunction: "After a review of this decision (of the Law Judge) and the entire record, this court must conclude that petitioner does not have reasonable cause to believe that respondent has engaged in the charged unfair labor practices" (A.). The General Counsel argues on pp. 13-14 of his brief that the Regional Director's version of the facts should be upheld in the face of contrary findings by the Law Judge. No authority is cited for there could be none. The Law Judge has heard and seen the witnesses under oath and after cross-examination. The Regional Director has merely made an investigation. The General Counsel would have the Court rule as if the hearing and record before the Law Judge and the findings and decision of the Law Judge did not take place.

POINT II

THE CLAUSE UNDER ATTACK IS A VALID WORK PRESERVATION CLAUSE WHICH DOES NOT VIOLATE SECTION 8(e) OF THE ACT

Respondent and Bader Brothers have had collective bargaining agreements with each other for many years (A.). The agreements covered the wages, hours and working conditions of the employees of Bader Brothers engaged in commercial and household moving and storage, including driving, packing and warehousing work. The agreement in force when Bader Brothers was sold to Golden Cycle was effective from April 1, 1974 to March 31, 1977.

The clause of the agreement attacked by the Regional Director is one which requires Bader Brothers to notify any purchaser of the existence of the collective bargaining agreement; to send a copy of such notification to the Union; to advise the Union of the exact nature of the transaction; and to require the purchaser of its operation i.e., Golden Cycle, to assume the obligations of the agreement. The clause further provides that if Bader Brothers fails to require the purchaser to assume the obligations of the agreement Bader Brothers is liable for damages sustained as a result of such failure. The clause has been in the Local 814 general collective bargaining

agreement since 1965 (A.).

Bader Brothers has not abided by any of the contractual requirements imposed by this clause (A.). Local 814 and Bader Brothers agreed to arbitrate whether this failure was a violation of the agreement, and an arbitrator jointly selected by the parties, scheduled and convened an arbitration hearing (A.). At the hearing the arbitration was postponed at the request of Bader Brothers, over the objection of the Union (A.). The arbitration was rescheduled for July 31, 1975. Thereafter, Bader Brothers filed an unfair labor practice charge with the Regional Director alleging that the clause described above violates Section 8(e) of the Act. Bader Brothers has not sought to stay the arbitration (A.).

It is Respondent's position that the clause attacked is a valid work preservation clause which in no way violates Section 8(e). Section 8(e) provides as follows:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void" (Proviso omitted).

The Supreme Court in National Woodwork Mfrs. Association v. NLRB, 386 U.S. 612 (1967) held that a contract clause does not run afoul of Section 8(e) if the clause was intended to protect and preserve work customarily performed by employees in the bargaining unit. The test of such a clause set forth by the Court is:

> "...[W]hether, under all the surrounding circumstances, the Union's objective was preservation of work for (the employer's) employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." Ibid. at 644.

In the instant case, the union's only interest and objective was to protect and preserve the work of those Bader Brother's employees who were in the unit of drivers, packers and warehousemen previously described (A.), and the contract clause itself protected only "the employees covered" by the agreement. The employees covered by the agreement were required by the agreement to be employed by the purchaser (Golden Cycle) in the manner specifically set forth in paragraph 21(H) of the Agreement as follows: "Whenever one company is absorbed by, merged with, purchased or acquired in any manner by another company, the employees of both companies shall be integrated into one seniority list by their dates of original employment (A.). Each employer under the contract to the Union has its own seniority list

and those employees must work before the employer can seek other employees (A.). The Administrative Law Judge specifically found that:

> "Charles Martelli, the Respondent's Secretary-Treasurer credibly testified that Article 50(B) was first negotiated and embodied in the bargaining contract in 1965 to assure the continuity in employment of the unit employees of a company taken over by another "(A.). [emphasis supplied].

Thus, the primary beneficiaries of the clause claimed to violate Section 8(e) were the actual employees in the Bader Brothers unit at the time of the sale, and not all the members of the Union, or the Union itself. The Administrative Law Judge concluded:

> "In summary, I find that Article 50(B) of the Respondent's bargaining contract is a legitimate work preservation clause designed to assure unit employees continued employment, which does not contravene Section 8(e) of the Act. (A.)."

In NLRB v. National Maritime Union (Commerce Tanker), 486 F. 907 (2nd Cir. 1973) cert. denied, 416 U.S. 970 (1974) and Danielson v. Masters, Mates and Pilots (Seatrain), 521 F.2d 747 (2nd Cir. 1975), the Court of Appeals decided that the collective bargaining agreement clauses in each case were not, under the circumstances presented, primarily for the preservation of the work of

existing members and that an injunction would be proper. However, the Court also forecast that a clause of the kind in question here would not violate Section 8(e) under the circumstances presented here. In Commerce Tanker, the Union did not require that the employees of the selling employer (the unit employees), who were members of the Union be employed by the purchaser, but required the purchaser to employ other union members.* In Seatrain, no union members had ever been employed by the selling employer, but the union required that the seller nevertheless demand that the purchaser employ members of the union to man the new ships it purchased. The Court decided in both cases that the unions were not attempting to preserve the work of the unit members since in the former case the unit members employed by the seller would not have been employed by the purchaser as a result of union hiring rules, and in the latter case there were never any employees in the unit whose work required preservation. Accordingly, the Court held in each case that there was no valid work preservation intent (although it conceded in Commerce Tanker that the question there was a close one). In the instant case, the employees to be protected are the

*The practice of the Union was to remove all of the Union Seamen from a ship which had been sold, and to replace them with a new crew of union members provided by the union hiring hall.

employees of the selling employer who were actually employed at the time of the sale of the business.

The Regional Director argues that the agreement Bader Brothers was required to have assumed by Golden Cycle contains clauses which do not directly benefit the employees, such as a union security clause and a check-off clause. These are standard clauses in union contracts which benefit the employees as well as the Union. However, whatever peripheral union interest might be served by these two items the remainder of the 84 page contract directly benefits the employees in the unit alone.

The Regional Director's argument was treated with in Commerce Tanker and Seatrain by analogy to the "union standards" - "union signatory" distinction established in subcontracting litigation. Both cases recognize that there is a substantial difference between subcontracting and sales - purchase transactions such as the one here, and the Court in each case decided that a balancing of the factors in each case by the Court is required to determine whether the contract clause in question was more analogous to a union signatory or to a union standards clause. In both cases, the Court found that the clause was more an unlawful union signatory clause than a lawful union standards clause under the circumstances presented. The Court struck

the balance in favor of union signatory because, as noted above, the clause did not protect the work of only the unit employees, but instead sought to protect the work of other members of the union.

In any event, the subcontracting analogy is not appropriate where, as here, a business is sold, since in a subcontracting case the unit employees by definition do not perform the work, whereas in this case, the union contract requires that the unit employees continue to perform the work. The employees of a sub-contractor who were not union members would be required to become union members, whereas here, the employees who would work for the purchaser were already union members.

The contention that the "union signatory" nature of the clause attacked requires a purchaser of Bader Brothers to recognize the Union and that this makes the clause unlawful under Section 8(e) is spurious for another reason. The practical effect of adopting the Regional Derector's argument would be an exercise in futility inasmuch as if the purchasing employer was lawfully required by the seller to hire the seller's employees, the Supreme Court holds that the purchasing employer would be required to recognize and bargain with the union. NLRB v. Burns International Security Services, Inc. 406 U.S. 272 (1972). If the purchasing employer was also law-

fully required to provide all the economic benefits of the seller's contract with the union, the only items left for the purchaser to negotiate with the union would be the union security clause and check-off clause.

The Regional Director's argument on pp. 21-23 of his brief that the clause becomes unlawful, even if part of its purpose is to protect the work of the employees, because the clause also seeks to protect their wages and benefits is totally contrary to the Board's long standing position that union standards clauses are perfectly proper.

The Regional Director's reliance on Burns, supra, and General Motors Corp., 191 NLRB 951, enf'd 470 F.2d 422 (D.C. Cir. 1972) is misplaced. The Supreme Court in Burns did not prohibit a successor from assuming a predecessor contract, and indeed specifically permitted such assumption. The General Motors case was a refusal to bargain dispute not involving an existing clause in a contract in which it was found that an employer was not required under Section 8(a)(5) of the Act to bargain over the decision to sell his business. An employer is allowed to bargain about it in such a decision, and, in any event, in this case the clause was bargained about and is contained in the contract.

It should be noted that the Regional Director is careful not to argue that Article 50B is void and unenforceable

on its face, as he could not, since the clause became effective more than 6 months before the filing of the unfair labor practice charge and is therefore immune from attack under Section 10(b) of the Act. See NLRB v. Local 28, Sheet Metal Workers Int'l Assn., 380 F.2d 827, 829-830 (2nd Cir. 1967). It is only after attempted enforcement of the clause by arbitration and by picketing that the Regional Director contends the Act was violated. Stated otherwise, the Regional Director would not take action against the clause alone more than 6 months after the effective date of the clause.

POINT III

The Sale of Bader Brothers' Business is Not "Doing Business" Within the Meaning of Section 8(e) of the Act

There can be no violation of Section 8(e) in the instant case because Bader Brothers' sale of its operation to Golden Cycle does not constitute "doing business" within the meaning of Section 8(e). In the Commerce Tanker case, the Court stated:

> "It may at least be doubted whether the isolated sale of a capital item such as a ship comes within this language. It is arguable that such a transaction does not fit either the letter of the statute or the

probable congressional purpose."
(Commerce Tanker, supra at 911).*

The Court further stated that because the union counsel disclaimed reliance on this argument it would assume without deciding that the ship-sale transaction was "doing business".**

In Seatrain, the Court reiterated the doubt expressed in Commerce Tanker, but stated that there was evidence that the seller was engaged in and intended to continue in the business of selling ships, and this evidence "of doing business was adequate for the purpose of determining whether the Section 10(1) injunction should issue." Seatrain, supra at 2571.

In the instant case, Bader Brothers' sale of its business is obviously a capital type of transaction and is clearly the kind of isolated sale which the court indicated in Commerce Tanker and Seatrain would not fall within the

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*The Board found in its Commerce Tanker opinion that the "doing business" requirement was met because "the transactions involved here do not represent a novel situation but occur in the normal course of business in the maritime industry." 196 NLRB 1100, 1101, 80 LRRM 1198, 1199. Appellant here cannot reasonably contend that the sale of Bader Brothers entire moving and storage business occurs in "the normal course of business" in the moving and storage industry.

**The Board expressly stated that it would not consider the applicability of Section 8(e) "to the sale of capital assets in other industries or in other circumstances," because that consideration was unnecessary to its decision.

proscription of Section 8(e). The Regional Director's attempt to equate the sale of a truck with the sale of a business or the sale of a multi-million dollar capital asset such as a ship is insupportable. The business of Bader Brothers was the moving and storage of households and commercial companies and not the business of selling its business.

The Court in Commerce Tanker noted that the Supreme Court in Textile Workers Union v. Darlington Manufacturing Co., 380 U.S. 263, (1965) stated that the decision to terminate a business is peculiarly a matter of management prerogative. The Supreme Court in Darlington also quoted with approval the following portion of the opinion of the Court below:

> "'It [the Act] does not compel a person to become or remain an employee. It does not compel one to become or remain an employer. Either may withdraw from that status with immunity, so long as the obligations of any employment contract have been met.'" [emphasis supplied; 325 F.2d at 685 (4th Cir.)]

Bader Brothers had the right to go out of business, but it had the corresponding duty of complying with and fulfilling its contractual obligations. Moreover, the Bader-Golden Cycle transaction was the transfer of an entire business where the "employing industry" remained the same. This is not a Darlington case where the Supreme Court held only

that it was not a violation of Section 8(a)(3) of the Act for a company to go out of business for whatever reason it chose.

The legislative history of Section 8(e) was reviewed in detail by the Supreme Court in National Woodwork. The genesis of Section 8(e) was the dissatisfaction of Congress with the decision of the Supreme Court in Local 1976, United Brotherhood of Carpenters v. N.L.R.B. (Sand Door), 357 U.S. 93, (1958) where the Court held that the execution of a contract containing a clause where the employer agreed not to handle "non-union material" was not unlawful. This clause was known as a "hot cargo" clause. The Supreme Court said in National Woodwork: "Section 8(e) was designed to plug this gap in the legislation by making a 'hot cargo' clause itself unlawful." An entire business is not "material" or "cargo". Section 8(e) has no application to the sale of a business.

The Sealtest case cited by appellant (147 NLRB 230) is inapposite. Sealtest involved the subcontracting of some bargaining unit work and the clause in question there was an unlawful union signatory clause. In the instant case, the transaction was a sale of the company's business, not a subcontract. Moreover, in Sealtest, the clause did not protect the former Sealtest employees who did the work, but

sought to assert the union's hegemony over other employees while in the instant case the employees of the seller were the employees to be protected by the clause, making the clause a valid work preservation agreement.

The Board recently has held squarely that the sale or transfer of a business is not "doing business" within the meaning of the Act. In International Union of Operating Engineers Local 701 (Tru-Mix Construction Co.), 221 NLRB No. 124, the Board stated:

> Contrary to the General Counsel, we do not view Commerce Tankers, supra, as precedent for the conclusion that the instant contractual clauses are unlawful under Section 8(e). In Commerce Tankers the Board held that the sale of vessels in the maritime industry was a fairly common occurrence and did not "represent a novel situation but occurs in the normal course of doing business." That concept would seem inapplicable to a situation, as here, where an entire business entity may be transferred from one person to another. This would not involve a contractually required refusal to deal in "hot goods," "unfair materials," or "blacklisted" products, or an agreement to withhold services from an "unfair" employer, the primary concern of Congress in legislating this section of the Act. (footnotes omitted).

The Tru-Mix case is the Board law on the issue. It is determinative of this case. Unless and until the Board overrules itself, the General Counsel and Regional Director are bound by the decision.

POINT IV

THE COURT SHOULD NOT INTERFERE WITH THE ARBITRATION PROCESS IN THE PARTICULAR CIRCUMSTANCES OF THIS CASE

The Supreme Court, in its series of decisions commonly known as the"Steelworker Trilogy", set forth the fundamental principle that federal courts should avoid intrusion in the arbitral process. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

In Seatrain, supra, this Court examined the propriety of permitting an arbitration to proceed. The Court referred to its earlier statement in United Optical Workers v. Sterling Optical, 500 F.2d 220 (2nd Cir. 1974), that "the validity of [the provision] under Section 8(e) lies initially in the exclusive province of the arbitrator." The Court recognized the deferral of arbitration doctrine established by the Board itself in Collyer Insulated Wire, 192 NLRB 837 (1971). The court distinguished those cases from the case it was ruling on and declined to permit arbitration for one thing because

it was not a Section 301 action, but mainly because where:

> "... the jurisdiction of an arbitrator provided for by the contract is restricted, as here, to 'disputes relating to the interpretation or performance of this Agreement' (emphasis in original), resort to arbitration may be futile since it is not at all clear that the arbitrator may disregard the plain provisions of the contract." Seatrain, supra at 755.

It is clear from the foregoing that if the Court in Seatrain had before it the arbitration clause in the instant contract, the Court would not have affirmed issuance of the injunction, but would have permitted the arbitration process to proceed because the arbitration clause in the Bader Brothers collective bargaining agreement is phrased as broadly as possible and provides the arbitrator with virtually unlimited authority. The arbitration clause, Section 36(B) of the Agreement, provides as follows:

> "All disputes, grievances and controversies between the parties of any nature whatsoever, whether related specifically to the provisions of this Agreement or not, including but not limited to claims for violation of the Antitrust Laws of the United States, or any state, or claims for violation of the Labor Laws of the United States or any state (including Sec. 303 of the LMRA), which cannot be adjusted by the representatives of the Employers and the Union, shall be submitted to the Joint Board and if deadlocked, to arbitration before the Impartial Chairman as may be appropriate. The Joint Board and if deadlocked, the Impartial Chairman, shall be the exclusive forum for the determination of all such matters. (emphasis supplied).

The arbitrator's ruling should the arbitration proceed, may not be in conflict with the provisions of the Act and he should be permitted the opportunity to rule. The Union and Bader Brothers voluntarily negotiated for the arbitrator's ruling in the interpretation of any clause in the contract. This case is distinguishable from McLeod v. AFTRA, 234 F.Supp. 832 (E.D.N.Y. 1964), enf'd on district court opinion 351 F.2d 310 (2nd Cir. 1965) where the court enjoined an arbitration from proceeding. In AFTRA, it was the contract clause alone that constituted the 8(e) violation because the contract containing the clause became effective less than six months prior to the filing of the unfair labor practice charge. The arbitration compounded the violation, which was the mere existence of the clause. In the instant case, as shown in Point II, supra, it is not the clause itself which is the violation, but the circumstances surrounding its attempted enforcement by the union, particularly the Regional Director's argument that it was not the employees that the clause was intended to benefit, but the union. Should the arbitrator rule that only the employees receive relief, then the implementation of the clause in these circumstances will not be contrary to the Act. The balance in this case between no federal court intrusion in the arbitration process and the Regional Director's authority under Section 10(l) should be drawn in favor of non-interference. In AFTRA, it was the clause "in and of itself" which was the unfair labor practice,

not any conduct Id. at 841. In the case at bar it is the conduct, not the clause itself, which is the alleged unfair labor practice.

In addition, in both Seatrain and Commerce Tankers, supra, the court placed substantial emphasis on the havoc being wrought to interstate commerce by the contending unions in each case. There had been constant jurisdictional disputes between the unions over the same issue which were exacerbated by their conflicting arbitration claims. In the instant case, there is no possibility of any jurisdictional disruptions, whether resulting from arbitration or otherwise.

POINT V

THE PICKETING ENGAGED IN BY THE UNION WAS LAWFUL PRIMARY PICKETING

The Regional Director's attack on the picketing is at most half-hearted and is peripheral to the attempt to foreclose enforcement of the contract by arbitration. The Regional Director devotes hardly a page in his brief to support its allegation of unlawful picketing. He is even unsure of his own theory of illegal picketing. The complaint was amended at the unfair labor practice hearing changing the identity of the primary and secondary employers (A.). The union picketed both Bader and Golden Cycle because the Union had a primary dispute with both companies (A.)

and this was so found by the Administrative Law Judge (A). Both companies were located on the same premises. The Union picketed Bader Bros. because Bader Bros. did not comply with its contract and the union picketed Golden Cycle because Golden Cycle did not hire the former Bader Bros. employees and assume the obligations of the contract. The objectives of the union in both instances were the traditional and historical lawful primary objectives.

Moreover, the picketing ceased on July 25, 1975 and there is no likelihood that it will be resumed. Bader Bros. is out of the moving and storage business and there is no facility or operation or business for the union to picket. The Union's claim may now be resolved only through the arbitration process. Golden Cycle does not fear any picketing since it never filed an unfair labor practice charge against the union and in any event, the union no longer has anything to gain by picketing Golden Cycle.

POINT VI

IT WOULD NOT BE "JUST AND PROPER" TO ISSUE EQUITABLE RELIEF AGAINST THE UNION

In Danielson v. IBEW Local 501, 509 F.2d 1371 (2nd Cir. 1975), this Court put the Regional Director on notice that he would have to move quickly on an appeal from a denial of a 10(1) injunction by the district court in order to

obtain interim injunctive relief, because otherwise the court would not be satisfied that the public interest was being harmed. Notwithstanding this advice from the Court the Regional Director in this case did not seek a stay or an expedited appeal until 2-1/2 months after the district court denied the injunction. The Regional Director cannot support his argument of vindication of the public interest when the union was free to picket for 2-1/2 months and when the arbitration to enforce the clause was scheduled for seven weeks before the Regional Director moved (A.).

In Seatrain, supra, the court found that Seatrain "demonstrated a sufficient likelihood of success on the merits and of harm pending final adjudication to warrant the injunction..." supra at 756. Neither Bader nor the Regional Director has demonstrated either. There is no "continuing cloud" on Bader operations as there was on Seatrain's because Seatrain was going to continue building and selling ships. Bader is out of business.

As the court said in IBEW Local 501, supra, at 1375:

> "One factor we should consider in this case is whether there is a pressing need for extraordinary equitable relief."

CONCLUSION

Accordingly, for the reasons stated above, the order below should be affirmed.

Respectfully submitted,

COHEN, WEISS and SIMON
Attorneys for Appellee

Of Counsel:
Eugene S. Friedman
James V. Morgan

STATUTES INVOLVED

Section 8.

"(a) It shall be an unfair labor practice for an employer -

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...."

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

"(b) It shall be an unfair labor practice for a labor organization or its agents -

(4) (i) to engage in, or to induce or encourage any individual employed by an person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful,

any primary strike or primary picketing;..."

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

Section 10.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice

(including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934."

"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States

AFFIDAVIT OF SERVICE

State of New York)
: ss.:
County of New York)

The undersigned, attorney at law of the State of New York, being duly sworn, deposes and says that on May 17, 1976, deponent served the annexed Brief of Respondent-Appellee upon the attorneys for Petitioner-Appellants herein by:

1. Mailing in a properly addressed, post-paid envelope two copies of the annexed brief to: "National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. (Room 700; Attention: Joseph E. Mayer), the address designated by said attorneys for that purpose and by

2. Causing two additional copies of the aforesaid brief to be delivered to the same address by hand by Air Couriers, Int'l.

The undersigned further certifies that he has also caused a copy of the aforesaid brief to be delivered by hand to Samuel M. Kaynard, Esq., Regional Director, Region 29, 16 Court Street, Brooklyn, New York.

James V. Morgan
James V. Morgan

Sworn to before me this
17th day of May, 1976.

Susan C. Bindert
Notary Public

SUSAN C. BINDERT
Notary Public, State of New York
No. 41-4521189
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1977